RENGANATHAN vs. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan C.J. Malayan Union, Murray Aynsley C.J. Singapore, and Bostock Hill J.) July 7, 1947]

Penal Code, Section 375 and 376 — Rape — Consent — Proof that girl is under fourteen years of age.

In this case the appellant was convicted of the offence of rape contrary to Section 376 of the Penal Code. The evidence in the case indicated that the girl gave her consent to the intercourse. There was no definite evidence to show that the girl was under fourteen years of age.

Held, that as the learned trial Judge was of opinion that the girl gave her consent to the intercourse and as there was no definite proof that the girl was under fourteen years of age the conviction for rape was wrong and must be quashed.

CRIMINAL APPEAL.

Appellant in person.

J. C. N. Kilner for the Respondent.

The judgment of the Court was delivered by :—

Willan, C. J. : — In this case the appellant was convicted of the offence of rape contrary to section 376 of the Penal Code.

By section 375 of that Code a man does not commit rape if he has sexual intercourse with a woman with her consent if she is over fourteen years of age.

In this case the learned trial Judge in his grounds of judgment states as follows :—

> "I was of opinion that the girl did not object to the intercourse and, in a non legal sense, may even have consented."

This, in our view, can only mean that the learned trial Judge found as a fact that the girl gave her consent. That being so the evidence of the age of the girl is vital.

As to this the mother of the girl gave evidence that the girl was between ten and fifteen years of age. The Medical Officer who examined the girl gave evidence that in his opinion the girl is about twelve or thirteen years of age. He was not asked if, in his opinion, she was definitely under fourteen years of age.

Accordingly, since there is no definite proof that the girl was under fourteen years of age we allow this appeal and quash the conviction and sentence.

Appeal Allowed.

ABU BAKAR bin IMAM IDRIS v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan C.J., M.U., Murray Aynsley C.J. S'pore, and Bostock Hill, J.) July 9, 1947]

Penal Code, Section 34 — Common Intention — Necessity of showing that criminal act was committed in furtherance of a common intention.

In this case the appellant appealed against his conviction for the murder of one Kunya Ahmad Kutty. The evidence showed that the deceased was stabbed by three persons, one of whom was the appellant. In his summing up the learned Judge said inter alia "If two or three or four people take part in any act which leads to the death of another person and they act in conjunction, then every one of those four is equally guilty of the death of the victim, and therefore, if you believe the evidence, the fact that the accused delivered two blows, the unknown Malay delivered another blow and the prosecution witness (Ismail) himself delivered another blow makes no difference whatsoever. If murder is proved all striking blows in the circumstances described by the witness are equally guilty. If you are satisfied beyond reasonable doubt that any one of those blows which led to the death of the victim was delivered by the accused that is sufficient for the purposes of this charge."

Held, (1) that to establish guilt under Section 34 of the Penal Code it is necessary to prove a common intention, and it must be shown that the criminal act was done in furtherance of that intention;

(2) that the summing up of the learned Judge in this case concentrated on the joint nature of the acts themselves rather than on the common intention to commit those acts and because of this misdirection the conviction must be quashed and a retrial ordered.

Case referred to :—

Mahbub Sha, A.I.R. (1945), P.C. 118, at p. 120.

CRIMINAL APPEAL.

R. Ramani for the Appellant.

B. D. W. Good for the Respondent.

The judgment of the Court was delivered by :—

Willan, C. J. : —This is an appeal against the conviction of the appellant for the murder of one Kunya Ahmad Kutty, hereinafter in this Judgment referred to as "the deceased".

The evidence for the prosecution was that about 8 o'clock on the morning of the 15th day of October, 1946, the appellant and the deceased were walking along a path towards a certain place where the appellant was to sell some goats to the deceased.

On their way they met a Malay, named Ismail bin Haji Ali, hereinafter in this judgment referred to as Ismail. According to Ismail he accompanied the appellant and the deceased along this path, at the invitation of the appellant. The three of them walked in single file the deceased first, the appellant second and Ismail last.

What happened subsequently rests entirely on the evidence of Ismail. His version is that whilst the three of them were walking along this path in the order just mentioned, the appellant drew a kris from his waist and stabbed the deceased in the back, below the ribs, on the right side. The deceased fell down immediately and the appellant stabbed him a second time in the forehead. Ismail asked the appellant why he had stabbed the deceased and the appellant replied that he wanted to take the deceased's money.

Continuing, Ismail stated that the appellant then caught him by the wrist and told him to keep quiet about this affair, and Ismail, being frightened promised that he would not say anything. Then, according to Ismail, another Malay came on the scene behind him, and threatened to stab Ismail with a knife which he, that other Malay had in his hand, if Ismail told anyone about this affair. Then, in order to implicate Ismail with the killing of the deceased, that other Malay threatened to stab Ismail if he, Ismail, did not stab the deceased. Thereupon, Ismail being frightened, drew out a knife from his waist and struck the deceased on the left shoulder with it. At that time the deceased was still alive and conscious. Then that other Malay stabbed the deceased in his right side, also whilst the deceased was still alive. After the deceased received this fourth stab wound he collapsed.

That other Malay could not be found to give evidence at the trial.

Thus, the evidence of Ismail discloses that the deceased received four stab wounds from which he died, and that these four wounds were inflicted by three persons — the appellant, Ismail and that other Malay. Ismail's evidence also discloses that the appellant and that other Malay stabbed the deceased voluntarily, and that Ismail only stabbed the deceased because he, Ismail, was afraid of being stabbed to death by that other Malay if he did not do so.

Ismail's evidence raises two questions :—

(1) Was he an accomplice?

(2) The question of common intention as defined in section 34 of the Penal Code.

With regard to the first question, the learned trial Judge ruled that Ismail was an accomplice and rightly directed the Assessors that they should not convict the appellant unless they found independent corroboration of Ismail's evidence. He then went on in his summing-up to deal with what he regarded as corroborative evidence. No objection can be taken to this part of the summing-up of the learned trial Judge.

With regard to the second question, i.e. common intention, the learned trial Judge directed the Assessors as follows :—

> "Now, perhaps, I might refer here to one other matter. If you believe certain evidence which has been given, the unfortunate deceased person in this case died, not as a result of the blow from a kris from one man; he died, if you accept the evidence, from two blows from one man, one blow from another man and yet another blow from the deposing witness. The accused, you might consider, is only partly guilty. But that is not the case. If two or three or four people take part in any act which leads to the death of another person and they act in conjunction, then every one of those four is equally guilty of the death of the victim and therefore, if you believe the evidence, the fact that the accused delivered two blows, the unknown Malay delivered another blow and the prosecution witness (Ismail) himself delivered another blow, makes no difference whatsoever. If the murder is proved all striking blows in the circumstances described by the witness are equally guilty. Two were before you; one is missing; accused is here and the other (Ismail) gave evidence for the prosecution but that makes no difference to the charge put up by the prosecution. If you are satisfied beyond reasonable doubt that any one of those blows which led to the death of the victim was delivered by the accused that is sufficient for the purposes of this charge."

Now criminal liability where two or more persons combine in killing another is defined in section 34 of the Penal Code. That section reads :—

> "When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone."

Nowhere in the summing-up can we find that this section was read to the Assessors, and Crown Counsel, who prosecuted at the trial, informed us that the learned trial Judge did not read that section to the Assessors.

In our view the passage from the summing-up set out above concentrates on the joint nature of the acts themselves rather than on the common intention to commit those acts. To establish guilt under section 34 of the Penal Code it is necessary to prove a common intention, and it must be shown that the criminal act was committed in furtherance of that intention. This is pointed out by their Lordships of the Privy Council in the case of *Mahbub Sha v. Emperor*[1], as follows :—

> "Section 34 lays down a principle of joint liability in the doing of a criminal act....Under the section, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of s. 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has often been observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case."

In addition to this mis-direction in the summing-up of the learned trial Judge, we are not satisfied that either of the Assessors expressed an unequivocal opinion that the appellant was guilty of murdering the deceased.

The first Assessor said :—

"I find the accused took part in the murder but find that he did not strike the death blow."

The second Assessor said :—

"In my opinon accused took part in the murder though he may not have struck the fatal blow. Also I hold that the witness Ismail to a lesser degree and the missing Malay are also guilty."

The learned trial Judge accepted these as findings of guilty. In our opinion he should not have done so.

Accordingly, in view of the misdirection of the learned trial Judge and also because we are not satisfied that the opinions of the Assessors, as expressed by them, amount to unequivocal opinions that the appellant was guilty, we quash the conviction and order a new trial. The appellant is remanded into custody pending the new trial.

Conviction Quashed.
New Trial Ordered.

M. K. LUKSHUMEYAH vs. LOW SHONG KHAY.

[Orig. Civil Jurisdiction (Willan, C.J.) July 12, 1947]

Japanese Judgments and Civil Proceedings Ordinance 1946, Section 4 — Application to carry on proceedings instituted in Japanese Court for recovery of money alleged to be due on a promissory note — Courts (Restriction of Civil Jurisdiction) Ordinance 1946 — Moratorium Proclamation No. 5.

In this case the applicant applied under section 4 of the Japanese Judgments and Civil Proceedings Ordinance 1946 to carry on proceedings instituted at the Japanese Court in Kuala Lumpur on the 30th of June 2602 (1942). That suit was a claim for $7,245 being principal and interest alleged to be due on a promissory note. At the hearing of the application it was questioned whether the order applied for could be made in view of (1) the provisions of the Courts (Restriction of Civil Jurisdiction) Ordinance 1946 and (2) the provisions of the Moratorium Proclamation No. 5.

Held, (1) that section 9 of the Japanese Judgments and Civil Proceedings Ordinance 1946 removes the obstacle contained in the Courts (Restriction of Civil Jurisdiction) Ordinance 1946, because that section provides that the provisions of the first mentioned Ordinance shall apply notwithstanding the provisions of the second mentioned Ordinance; (2) that the provisions of the Japanese Judgments and Civil Proceedings Ordinance 1946 do not override the provisions of the Moratorium Proclamation; (3) that the claim in the Japanese Civil Suit in this case falls within the definition of "debt" in the Moratorium Proclamation and that this debt, not being a debt incurred after the date when the Moratorium came into force, is subject to the provisions of that Proclamation; (4) that therefore the application must be dismissed.

ORIGINATING SUMMONS.

R. Ramani for the applicant.

Willan, C. J. : — This is an application under section 4 of the Japanese Judgments and Civil Proceedings Ordinance, 1946, to carry on the proceedings in Civil Suit No. 10 of 2602 (1942) instituted in the Japanese Court at Kuala Lumpur on the 30th day of June, 2602 (1942). That suit is a claim for $7,245 being principal and interest alleged to be due on a promissory note.

The Japanese Judgments and Civil Proceedings Ordinance, 1946, came into force on the 7th day of November, 1946, and an application under section 4 must be made "within three months from the commencement of this Ordinance or such extended time as the appropriate Court may allow". This application is dated the 6th day of June, 1947, and, being out of time, the applicant prays for the following order :—

(a) the time within which the applicant may apply for leave to carry on the said Civil Suit be extended so as to permit the application being made on the date hereof,
(b) that leave be granted to carry on the proceedings in the said Civil Suit as if the suit had been instituted in this Honourable Court, and
(c) that on such order being made leave be granted for the issue of a fresh summons.

Mr. R. Ramani, who appeared for the applicant, quite frankly informed me of his uncertainty as to whether such an order could be made, and, since this was an ex parte application, I am grateful to him for his assistance in putting forward arguments in favour of, and against, the application.

Since this application relates to a claim for a debt, there are two obstacles to be got over before it can be granted. They are :—

(a) The provisions of the Courts (Restriction of Civil Jurisdiction) Ordinance, 1946;
(b) The provisions of the Moratorium Proclamation No. 5.

As regards (a), section 9 of the Japanese Judgments and Civil Proceedings Ordinance, 1946, removes the obstacle contained in the Courts (Restriction of Civil Jurisdiction) Ordinance, 1946, because that section provides that the provisions of the first mentioned Ordinance shall apply notwithstanding the provisions of the second mentioned Ordinance. By that I understand that the provisions of the Japanese Judgments and Civil Proceedings Ordinance, 1946, apply as if the Courts (Restriction of Civil Proceedings) Ordinance, 1946, had not been made; see the definition of "notwithstanding" in Stroud's Judicial Dictionary, 2nd edition, page 1295.